BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

OSCAR L. ROBERTS	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,561
LAFARGE CORPORATION	)	
Respondent	)	
AND	)	
	)	
CNA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Steven J. Howard on November 19, 1997. The Appeals Board heard oral argument April 21, 1998.

APPEARANCES

Robert W. Harris of Kansas City, Kansas, appeared for the claimant. Timothy G. Lutz of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent asks for review of the following issues:

1. Nature and extent of disability. The ALJ awarded 79.41 percent work disability. Respondent contends the ALJ erred in awarding a work disability in excess of the stipulated 15 percent functional impairment.

2. Overpayment of temporary total disability. Respondent contends the ALJ erred in failing to credit respondent for overpayment of temporary total disability. Respondent contends it overpaid temporary total

disability first by paying at a higher Missouri rate and then by paying after claimant was determined to be at maximum medical improvement.

3. Average weekly wage. Respondent contends that the wage used to determine the extent of work disability should not be calculated as a wage under K.S.A. 44-511. Respondent argues that a more equitable result is achieved with a weekly wage calculated by dividing the total wage by the number of weeks worked for up to a maximum of 26 weeks preceding the date of accident.

4. Did the ALJ err by adopting the award submitted by one of the parties and not deciding the case himself as required?

Respondent initially listed future medical expenses as an issue but at oral argument advised this was not an issue to be considered on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Board concludes the award by the ALJ should be modified. The Board finds claimant should be granted benefits for a 50 percent work disability.

Findings of Fact

1. Claimant worked as a concrete truck driver for respondent.

2. Claimant injured his neck, right shoulder, and back when he fell from a truck on September 1, 1995.

3. In 1984, claimant injured his neck in another accident while working for another employer. Dr. Edward J. Prostic rated the earlier injury as 20 percent impairment of the whole body. Dr. Harry B. Overesch rated the earlier injury as a 5 percent impairment of the whole body. Claimant settled the earlier claim for a 12.5 percent disability. After the 1984 injury, claimant returned to work without restrictions. Claimant testified that at the time of the current injury he had mostly gotten over the problems he had from the 1984 injury.

4. For the present injury of September 1, 1995, respondent provided medical treatment with Dr. Daniel D. Weed as the authorized treating physician.

5. Dr. Weed first saw claimant on October 31, 1995. At that time claimant complained primarily of problems with his neck and shoulder. He diagnosed cervical strain and shoulder impingement. The shoulder complaints resolved but claimant began complaining of low back pain. Dr. Weed's records for the visit of February 29, 1996, state claimant is

"still having lower back pain." Nevertheless, Dr. Weed testified this was the first time he remembered claimant complaining about his back. Although Dr. Weed testified he would have expected back complaints to appear earlier if they were attributable to the September 1, 1995 accident, Dr. Weed also rated the back problems and testified that, in his opinion, claimant sustained injury to his cervical spine, shoulder and low back. Dr. Weed rated the impairment as 15 percent to the whole body for the cervical spine injury and 10 percent to the whole body for the lumbar spine injury. Based on the assumption that claimant's 1984 injury caused a 20 percent general body impairment (Dr. Prostic's rating for the 1984 injury), Dr. Weed concluded claimant sustained no additional impairment to the cervical spine. When advised of claimant's settlement for the 1984 injury based on a 12.5 percent impairment, Dr. Weed stated he would then say claimant has an additional 2.5 percent impairment for the cervical injury. In both cases, Dr. Weed simply compared the preexisting impairment to his current rating of 15 percent. Dr. Weed also testified he did not know whether claimant's cervical impairment was from his 1984 injury or from the new injury in 1995.

6. On February 29, 1996, Dr. Weed concluded claimant had reached maximum medical benefit and suggested claimant return to full duty to be checked again in three weeks. On April 30, 1996, Dr. Weed noted claimant was worse from working. Dr. Weed testified claimant was at maximum medical improvement on April 30, 1996. On June 7, 1996, Dr. Weed noted in his record that he would keep claimant off work until he received the results from the MRI of the lumbar spine but also noted claimant might not be able to return to his previous job. On June 13, 1996, Dr. Weed advised claimant that the MRI revealed degenerative changes at several levels and disc bulging but nothing that impinges the neural foramen and nothing which would warrant surgery. Dr. Weed again stated he seriously doubted claimant would be able to return to the type of work he was doing. Dr. Weed then concluded there was nothing further he could offer claimant and released claimant from his care.

7. Dr. Weed also recommended restrictions. For the low back injury, Dr. Weed recommended claimant limit lifting to 50 pounds occasionally and 25 pounds on a frequent basis. Dr. Weed also opined that claimant could not, because of the cervical injury, do long distance or repetitive driving. Specifically, claimant could not turn his head to the right as required for the driving. The restriction against driving was, in Dr. Weed's opinion, a restriction which he would attribute to the preexisting cervical injury. Dr. Weed concluded claimant could not return to driving a cement truck.

8. Dr. Weed also gave an opinion regarding task loss based on his review of a report prepared by vocational expert Karen C. Terrill. Ms. Terrill prepared a list of the tasks claimant performed during the 15 years prior to the injury of September 1, 1995. Based on the restrictions specifically attributable to the September 1, 1995 injury, i.e. the lifting restriction for the low back injury, Dr. Weed agreed claimant lost the ability to perform 6, or 23 percent, of the 26 tasks he had performed.

9. Claimant has a 20 percent permanent partial disability in addition to the disability claimant had from his 1984 injury. According to Dr. Prostic, the current injury aggravated the 1984 injury but most of the new problems are from the lumbar spine injury. Dr. Prostic testified he did not give restrictions when he saw claimant in 1985 because the law was different at that time. He would now restrict against lifting over 50 pounds occasionally or 25 pounds frequently, use of the head away from the neutral position, and use of vibrating equipment. Dr. Prostic agreed that, although he did not give restrictions in 1985, the current restrictions relating to the cervical injury were no greater than he would have given in 1985. The only new restrictions were for the low back injury.

10. In a list of tasks prepared by vocational expert Richard W. Santner, Dr. Prostic identified 6 tasks (46 percent) claimant could no longer perform out of a total list of 13 tasks. On a time-weighted basis, the 6 tasks Dr. Prostic ruled out were 83.81 percent of the tasks claimant had performed in the 15 years prior to the accident.

11. Claimant attempted to return to work for respondent twice, once in October or November of 1995 and a second time from March to June of 1996. Claimant had problems with both his neck and back. Claimant testified that until December of 1996 he still expected to return to work for respondent in an accommodated position.

12. The Board finds claimant permanently injured both his low back and neck in the injury on September 1, 1995.

13. Claimant is now receiving social security disability benefits and has not looked for other employment.

14. Dr. Weed believed claimant was capable of returning to some type of employment. Dr. Prostic also believed claimant could return to some type of employment but thought it might need to be part-time at first, until claimant had the low back surgery Dr. Prostic thought necessary. Both Karen Terrill and Richard Santner believed claimant was capable of doing some type of work. Karen Terrill believed claimant was capable of returning to work at a wage comparable to his pre-injury wage.

15. Claimant was paid temporary total disability benefits for the period September 5, 1995 through October 9, 1995 (5 weeks) and November 9, 1995 through March 6, 1996, (17 weeks) at the rate of $463.62 per week. Claimant was also paid temporary total disability benefits for the periods June 7, 1996 through June 27, 1996 (3 weeks) at the rate of $463.62 per week, and June 28, 1996 through December 5, 1996 (23 weeks) at the rate of $326 per week.

16. Claimant earned $14.85 per hour as a full-time employee. His average overtime pay was $186.66 per week and his additional compensation was $193.52 per week for a total of $974.18 per week.

Conclusions of Law

1. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

2. The wage loss factor is based on the actual wage loss only if the claimant has made a good faith effort to find employment. If the claimant has not made a good faith effort to find employment, a post-injury wage is imputed to the claimant based on the relevant factors. The opinion of a vocational expert may be used to establish claimant's wage earning ability. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

3. The Board finds claimant was, after the injury in this case, capable of returning to substantial gainful employment. This conclusion is supported by the testimony of Dr. Weed, Dr. Prostic, and both vocational experts who testified. Claimant has qualified for social security disability benefits but the Board must rely on the record presented in this case. The social security determination does not control this issue. As indicated, based on the record before it, the Board finds claimant capable of substantial gainful employment.

4. The Board finds claimant is capable of earning minimum wage, $5.15 per hour, on a full-time basis for a weekly wage of $206. The Board acknowledges testimony by Ms. Terrill that claimant is capable of earning a wage comparable to the wage he was earning at the time of this injury. But the Board does not consider this conclusion credible given the extent of this injury and the opinions by both Dr. Weed and Dr. Prostic that claimant can not return to his previous employment. Ms. Terrill suggested work as a security guard but did not support her conclusion that claimant could earn a comparable wage.

5. Claimant has not made a good faith effort to find employment and the $206 per week should be imputed to claimant for purposes of determining the wage loss. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. Claimant was a full-time employee at the time of the injury and his average weekly wage at the time of the injury was $974.18. K.S.A. 44-511.

7. For purposes of computing the wage loss component of the work disability formula, claimant has a wage loss of 79 percent. This calculation compares $974.18 to $206. The Board has used the wage calculation method from K.S.A. 44-511 because the definition of work disability in K.S.A. 44-510e uses the phrase "average weekly wage" and that phrase is defined in K.S.A. 44-511.

8. The Board finds claimant has lost the ability to perform 46 percent (6 of 13) of the tasks he performed during the 15 years prior to the current injury. This conclusion is based on the opinion of Dr. Prostic without time weighting the tasks. The Board has not utilized the opinion of Dr. Weed based on Ms. Terrill's report because it considered only the task loss attributable to the back injury. It did not include task loss due to the neck injury.

9. Claimant has a work disability of 62.5 percent, the average of the 46 percent task loss and the 79 percent wage loss. K.S.A. 44-510e.

10. The Board finds respondent is entitled to credit for the overpayment of temporary total disability due to the fact respondent payed for a period at the higher Missouri rate. The Board further finds payments of temporary total disability after Dr. Weed determined claimant had reached maximum improvement constituted an overpayment. K.S.A. 44-510c(b). Respondent is entitled to a credit for the overpayment. K.S.A. 44-525. The total overpayment was $11,590.50.

11. Respondent argues the ALJ did not decide this case. He asked each party to submit a proposed award and then chose one. Respondent asserts that this procedure forces an all or nothing choice and does not satisfy the ALJ's obligation to decide the case. The Board concludes this argument is, at this stage of the proceedings, a dispute without remedy beyond the conduct of a de novo review by the Board as is required in each case.

12. K.S.A. 44-501 provides that the disability awarded must be reduced by the extent of any preexisting functional impairment:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

13. The Board finds claimant had a 12.5 percent functional impairment preexisting which should be deducted from the 62.5 percent work disability. Claimant is, therefore, entitled to benefits for a 50 percent disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard, dated November 19, 1997, should be, and hereby is, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN FAVOR of the claimant, Oscar L. Roberts, and against the respondent, LaFarge Corporation, and its insurance carrier, CNA Insurance Company, for an accidental injury which occurred September 1, 1995, and based upon an average weekly wage of $974.18, for 23 weeks of temporary total disability compensation at the rate of $326 per week or $7498, followed by 203.5 weeks at the rate of $326 per week or $66,341 for a 50% permanent partial disability compensation, making a total award of $73,839.

As of May 29, 1998, there is due and owing claimant 23 weeks of temporary total disability compensation at the rate of $326 per week or $7498, followed by 120 weeks of permanent partial disability compensation at the rate of $326 per week in the sum of $39,120 for a total of $46,618 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $27,221 is to be paid for 83.5 weeks at the rate of $326 per week, until fully paid or further order of the Director.

The Appeals Board adopts the other orders by the Administrative Law Judge relating to medical expenses, attorney fees, and court reporting fees.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert W. Harris, Kansas City, KS
Timothy G. Lutz, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director